Citibank Bhd v Mrs ND Chandrasegaran nee Nirmala Devi a/p Seperumaniam

HIGH COURT (KUALA LUMPUR) — SUIT NO S2–21–14 OF 1997
KAMALANATHAN RATNAM J
16 OCTOBER 1998

Civil Procedure *— Pleadings — Striking out, application for — First, second and third defendants granted judgment — Plaintiff attempts to impeach judgments — Whether allegations if proved would impeach judgments — Whether case against fourth defendant ought to be struck out*

The plaintiff had commenced foreclosure proceedings ('the OS') and filed a summons in the sessions court for the recovery of monies due against the first defendant and her husband pursuant to an overdraft facility agreement entered into between the parties. The third defendant — the first defendant's attorney — filed an application to set aside the order for sale granted to the plaintiff and counterclaimed for an order to discharge the charge. Upon the application of the third defendant, the High Court set aside the order for sale and ordered the plaintiff to pay damages to the first defendant. On 1 September 1994, the first defendant also succeeded in her counterclaim and obtained an order to discharge the charge. The plaintiff attempts to impeach the judgments obtained under the OS and in the sessions court on the ground that it was later discovered that the third defendant was at all material times an undischarged bankrupt and was therefore not entitled to be a lawful attorney of the first defendant. The fourth defendant, a subsequently appointed attorney for the first defendant, contends that the statement of claim discloses no cause of action against him and applied to strike out the plaintiff's claim against him. It was argued that no particulars of fraud had been pleaded as against the fourth defendant. The fourth defendant also pleaded res judicata and further submitted that the action ought to be struck out on grounds of duplicity in that the sessions court case filed much earlier, is still pending. The deputy registrar dismissed the application. The fourth defendant appealed.

Held, dismissing the appeal with costs:

There were sufficient allegations of fraud raised against the fourth defendant. The first defendant in giving his consent to the High Court at Penang for the sale of the property to the fifth defendant must have acted through the fourth defendant, the donee of the power of attorney. The fourth defendant clearly had a case to answer. Furthermore, the respondent/plaintiff only became aware of the improper instruments of power of attorney after the High Court hearing. The allegations of fraud as pleaded if proved would clearly impeach the earlier judgments obtained. The plaintiff must be given the right to trial (see p 285A–B, E); *Dr Ramachandran a/l Sivaguru v Perwira Habib Bank Malaysia Bhd & Anor* [1993] 3 MLJ 59 not followed.

A **[Bahasa Malaysia summary**

Plaintif telah memulakan prosiding penjualan ('SP tersebut') dan memfailkan saman di mahkamah sesyen untuk mendapat balik wang yang terhutang oleh defendan pertama dan suaminya menurut perjanjian kemudahan overdraf yang diikat di antara pihak-pihak tersebut. Defendan ketiga — wakil defendan pertama — memfailkan suatu permohonan untuk mengetepikan perintah jualan yang diberikan kepada plaintif dan membuat tuntutan balas untuk perintah melepaskan gadaian. Atas permohonan defendan ketiga, Mahkamah Tinggi mengetepikan perintah jualan dan memerintahkan plaintif supaya membayar ganti rugi kepada defendan pertama. Pada 1 September 1994, defendan pertama juga telah berjaya dalam tuntutan balasnya dan memperolehi perintah untuk melepaskan gadaian. Plaintif cuba untuk mencabar penghakiman yang diperolehi di bawah SP tersebut dan di mahkamah sesyen atas alasan bahawa ia kemudiannya diketahui bahawa defendan ketiga adalah pada semua masa material seorang bankrap yang tidak dilepaskan dan dengan itu tidak berhak menjadi wakil sah defendan pertama. Defendan keempat, wakil yang kemudiannya dilantik untuk defendan pertama, berhujah bahawa pernyataan tuntutan tidak mendedahkan sebarang kausa tindakan terhadapnya dan memohon supaya tuntutan plaintif terhadapnya dibatalkan. Adalah dihujahkan bahawa tiada butir-butir fraud telah diplidkan terhadap defendan keempat. Defendan keempat juga telah memplidkan res judicata dan seterusnya berhujah bahawa tindakan tersebut patut dibatalkan atas alasan kependuaan dalam ertikata kes mahkamah sesyen yang difailkan lebih awal masih belum diselesaikan. Timbalan pendaftar menolak permohonan tersebut. Defendan keempat merayu.

Diputuskan, menolak rayuan dengan kos:

Terdapat pengataan fraud yang mencukupi yang dibangkitkan terhadap defendan keempat. Defendan pertama dalam memberikan izin kepada Mahkamah Tinggi di Pulau Pinang untuk jualan harta kepada defendan kelima mestilah telah bertindak melalui defendan keempat, penerima surat kuasa wakil. Defendan keempat jelas mempunyai kes untuk dijawab. Tambahan pula, penentang/plaintif hanya sedar akan instrumen surat kuasa wakil yang tidak wajar selepas pembicaraan Mahkamah Tinggi. Pengataan-pengataan fraud seperti yang dihujahkan, jika dibuktikan, jelas akan mencabar penghakiman lebih awal yang diperolehi. Plaintif mesti diberikan hak perbicaraan (lihat ms 285A–B, E); *Dr Ramachandran a/l Sivaguru v Perwira Habib Bank Malaysia Bhd & Anor* [1993] 3 MLJ 59 tidak diikut.]

Notes

For a case on application for striking out, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) para 3811.

Cases referred to

Bank Industri (M) Bhd v Toplace Sdn Bhd & Ors [1997] 3 CLJ 389 (refd)

Dr Ramachandran a/l Sivaguru v Perwira Habib Bank Malaysia Bhd & Anor [1993] 3 MLJ 59 (not folld)

Hock Hua Bank Bhd v Sahari bin Murid [1981] 1 MLJ 143 (refd)

New Straits Times (M) Bhd v Kumpulan Kertas Niaga Sdn Bhd & Anor [1985] 1 MLJ 226 (refd)

Legislation referred to

Rules of the High Court 1980 O 18 r 19(1), (a), (b), (c), (d), (2)

Watson Peters (*Watson Peters & Mohd Fuad*) for the appellant/fourth defendant.

G Rajasingam (*Shearn Delamore & Co*) for the respondent/plaintiff.

Kamalanathan Ratnam J:

The appeal

The fourth defendant sought to strike out the plaintiff's claim against him. The application was made pursuant to O 18 r 19(1)(a) of the Rules of the High Court 1980 ('the RHC') and was dismissed by the deputy registrar. This appeal is against that dismissal.

Facts

At the request of the first defendant and her husband ('the borrowers'), the plaintiff granted two banking facilities:

(a) An overdraft facility of RM252,000 subject to the terms and conditions of an overdraft facility agreement dated 19 October 1990.

(b) A term loan of RM50,000 subject to the terms and conditions of a term loan agreement dated 14 September 1990 ('the promissory note').

In consideration of the said overdraft facility, the first defendant executed a legal charge over a piece of property. The term loan was an unsecured facility. The borrowers breached the terms and conditions of the overdraft facility agreement and the promissory note, by failing to pay the sums to the plaintiff. The plaintiff commenced foreclosure proceedings against the borrowers by way of Originating Summons No S1–24–206–92 ('the OS') for the recovery of the amount due under the overdraft. The plaintiff also filed a summons in the Kuala Lumpur Sessions Court, Summons No 52–2022–92, for the recovery of the monies due under the term loan.

The public auction of the said property was then fixed for 18 August 1993 at the reserve price of RM380,000. On 16 August 1993, the third defendant acting as the first defendant's attorney paid to the plaintiff a sum of RM256,408.49 being part payment of the amount due under the

overdraft. The appointment of the third defendant was through a power of attorney dated 20 July 1993. The payment was accepted by the plaintiff on a without prejudice basis. The public auction was then adjourned for the first defendant to settle the balance due under the overdraft and the term loan. At all material times, the second defendant was acting as the solicitor of the first and third defendants.

A dispute then arose. The third defendant refused to pay the amount of the balance demanded by the plaintiff and insisted on only paying the balance due based on his own calculations. It was also the case of the third defendant that the initial payment of RM256,408.49 had settled the principal amount due under the overdraft. This of course was denied by the plaintiff.

In the meantime, the third defendant forwarded to the plaintiff a further sum of RM48,092.40 by way of a cashier's order being payment of the interests due based on his own calculations. The plaintiff refused to accept this and returned the cashier's order to the second defendant's firm.

The third defendant then acting as the first defendant's attorney filed an application in the name of the first defendant to set aside the order for sale dated 1 December 1992 and also sought damages from the plaintiff. He also counterclaimed for an order to discharge the charge. In respect of the action in the Sessions Court at Kuala Lumpur, the third defendant again acting as the attorney of the first defendant applied to set aside the judgment in default dated 4 June 1992.

On 5 October 1993, the High Court set aside the order for sale dated 1 December 1992 with costs and also ordered that the plaintiff do pay damages to the first defendant. On 1 September 1994, the first defendant also succeeded in her counterclaim and obtained an order to discharge the charge. The plaintiff complied with the orders. In fact on 4 February 1997, the learned senior assistant registrar assessed damages against the plaintiff in the sum of RM250,000. The sessions court also set aside the judgment in default dated 4 June 1992 obtained by the plaintiff against the first defendant and her husband. The plaintiff's application for leave to appeal to the Court of Appeal against the order of 1 September 1994 was dismissed by the Court of Appeal on 13 October 1994 as it was of the view that leave need not be obtained for appeals against foreclosure proceedings. The plaintiff applied for a stay of execution of the order of the SAR dated 4 February 1997 pending: (a) the appeal to the judge in chambers against the said order of the learned SAR; and (b) the disposal of these proceedings before me. On 17 March 1997, the High Court granted an interim order for stay pending the hearing of the substantive stay application.

The plaintiff also applied to the sessions court for a stay of execution of its order setting aside the judgment in default. Upon the dismissal of the said application, the plaintiff successfully appealed to the High Court which on 17 August 1998 granted a stay of the sessions court proceedings pending the disposal of this suit before me.

The plaintiff's case (impeachment proceedings)

This suit is an attempt, inter alia, to impeach the judgments obtained under the OS and in the sessions court and to declare such judgments as null and void and to set them aside.

The basis for the impeachment is the subsequent discovery by the plaintiff that the third defendant was at all material times an undischarged bankrupt and was therefore not entitled to be a lawful attorney of the first defendant. The first defendant then appointed the fourth defendant, by a power of attorney dated 5 May 1994, as her attorney.

It is the case of the plaintiff that the first and second instruments of power of attorney are defective, unlawful, void ab initio and by reason thereof cannot be used in any court proceedings; and/or in the dealings with the charged property.

Case for the fourth defendant

The fourth defendant contends that the statement of claim discloses no cause of action against him. It is his case that other than merely stating that the fourth defendant is the donee of the power of attorney there is no averment that he had dealt with the said property. Further, it was argued that no particulars of fraud had been pleaded as against the fourth defendant.

The fourth defendant further relied on res judicata and further that this action ought to be struck out on grounds of duplicity in that the sessions court case filed much earlier, is still pending.

Findings of the court

It this case, the fourth defendant solely relies on O 18 r 19(1)(a) of the RHC. Order 18 r 19(1) and (2) read as follows:

> Striking out pleadings and indorsements
>
> (1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement, of any writ in the action, or anything in any pleading or in the indorsement, on the ground that —
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> (a) it discloses no reasonable cause of action or defence, as the case may be; or
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> (b) it is scandalous, frivolous or vexatious; or
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> (c) it may prejudice, embarrass or delay the fair trial of the action; or
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> (d) it is otherwise an abuse of the process of the Court;
>
> and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.
>
> (2) No evidence shall be admissible on an application under paragraph (1)(a).

Before I consider the submissions of the parties, I must add that when this case came up for hearing of the appeal on 26 September 1998, I had adjourned for written submissions because the respondent/plaintiff had

A indicated it would take time. Since the court had an open court hearing I had given each party a time frame to submit. After the respondent/plaintiff had replied to the appellant's submission by 24 September 1998, I gave the appellant/fourth defendant up to 1 October 1998 to reply, if any, to the respondent's/plaintiff's submission. There has been no reply by that date.

B The respondent/plaintiff took a preliminary issue. He argued that I ought not to consider the issue of duplicity of actions since this argument will relate to the appellant relying on sub-r 1(c).

Whether the question of duplicity of action falls within sub-rr 1(b), (c) or (d) is immaterial so long as it falls outside sub-r 1(a) and I do so find. Therefore, since the appellant has only relied on sub-r 1(a), I shall reject the C submission of duplicity of actions.

In *New Straits Times (M) Bhd v Kumpulan Kertas Niaga Sdn Bhd & Anor* [1985] 1 MLJ 226, the Federal Court held that in an application to strike out pleadings under O 18 r 19(1)(a) no evidence shall be admissible and the court must consider only the pleadings for the purpose of D determining whether the statement of claim disclosed no reasonable cause of action or the defence disclosed no defence. Applying the test advocated by the Federal Court, it is my finding that on the face of the statement of claim, I am not prepared to say that the cause of action pleaded as against the fourth defendant is unsustainable. In fact in *Bank Industri (M) Bhd v Toplace Sdn Bhd & Ors* [1997] 3 CLJ 389, I had held that so long as the E pleadings disclose some cause of action or raise some question fit to be decided by the judge, the mere fact that the case would be weak and not likely to succeed at trial, would not be a ground for the pleadings to be struck out.

It is obvious from a study of the present statement of claim that this suit F was commenced to impeach the judgment and the various orders made both in the High Court and in the sessions court on the grounds that the said orders were obtained by fraud and forgery. In *Hock Hua Bank Bhd v Sahari bin Murid* [1981] 1 MLJ 143 (FC), whilst holding that the court had no power under any application in the same action to alter and set aside a judgment regularly obtained after it had been entered, the court went on to G hold that if a judgment or order has been obtained by fraud and where further evidence which could not possibly have been adduced at the original hearing is forthcoming, a fresh action will lie to impeach the original judgment.

H *Particulars of fraud*

The appellant contends that no particulars of fraud have been alleged against him. I reject this submission. The statement of claim discloses that the first defendant and one Sivaloganathan worked together in the same office. The first defendant owed money to the said Sivaloganathan who obtained a judgment for the said sum. The first defendant however I disappeared from the country. The said Sivaloganathan then approached the second defendant to secure his services to enforce the judgment against the first defendant. The said Sivaloganathan then handed his entire file in

respect of this case to the second defendant and informed him that the first defendant had left Malaysia for India as she was heavily in debt to many persons. The pleadings disclose that the said second defendant advised the said Sivaloganathan that it would be expedient if the second defendant was allowed to arrange for a power of attorney from India purportedly issued by the first defendant, in Sivaloganathan's favour. This was to enable Sivaloganathan to redeem the said property from the plaintiff and to sell the same for a profit. It was arranged that the profit would then be utilised to set off the amount due to Sivaloganathan and the balance was to be shared equally between Sivaloganathan and the second defendant. This scheme did not materialise as Sivaloganathan refused to partake in it.

When Sivaloganathan discovered that pursuant to the order of the court dated 1 September 1994 the charge on the said property had been discharged, he issued out a writ of seizure and sale to secure his judgment sum obtained against the first defendant. He also lodged a caveat against the said property. The fourth defendant then, acting as the attorney of the first defendant, challenged the proceedings initiated by Sivaloganathan.

Sivaloganathan then went to India to investigate how the said power of attorney was obtained. He went to the address at No 33 Hunter Road, Ahmadnagar, Maharastra, India, as stated in both the instruments of power of attorney. The first defendant could not be located at the said address.

In so far as the first power of attorney was concerned, the said Sivaloganathan met with the notary public Mr Gorakhsnath N Kale, who was supposed to have attested the said power of attorney. Mr Kale informed Sivaloganathan that the serial number for the first power of attorney did not correspond with the Notary Register and accordingly he cancelled his Notarial Certificate. In any case, the third defendant was an undischarged bankrupt at the time the first power of attorney was purportedly executed.

It was pleaded that the second power of attorney was not valid and cannot be used because the notary public for the same, Mr Sivaram S Nadkarni, was not duly registered as a notary public as required under the laws of India. In fact, he could not be located and is believed to be non-existent. The plaintiff has thus pleaded that the signature of the first defendant on the first and second instruments of power of attorney and on all other documents and affidavits which were purportedly executed by the first defendant after the meeting between Sivaloganathan and the second defendant were not that of the first defendant. In fact, it has also been pleaded that after the charge had been discharged, the said property had been sold to the fifth defendant who is the brother of the second defendant. The fifth defendant denied the purchase, yet the second defendant has moved his legal firm to the said property.

The plaintiff has also averred that the said property had been transferred into the name of the fifth defendant despite Sivaloganathan's caveat over the said property and despite Sivaloganathan's on-going legal proceedings in connection with the said property. The transfer was purportedly obtained through the consent of the first and fifth defendants through a consent order dated 16 February 1995 at the Penang High Court

by way of Originating Summons No 24–88–95. The plaintiff has averred that the Penang High Court was not informed of the caveat and the on-going legal proceedings.

I am more than satisfied that there are sufficient allegations of fraud raised against the fourth defendant. The first defendant in giving his consent to the High Court at Penang for the sale of the said property to the fifth defendant must have acted through the fourth defendant, the donee of the power of attorney. The fourth defendant clearly has a case to answer.

The fourth defendant relied upon the case of *Dr Ramachandran a/l Sivaguru v Perwira Habib Bank Malaysia Bhd & Anor* [1993] 3 MLJ 59 where the High Court held that there was no evidence of the allegation of fraud, false misrepresentation or conspiracy against the defendant as contended by the plaintiff and that since all those averments could have been raised in the earlier O 14 proceedings by the bank against Dr Ramachandran, to re-open the same issues by a later impeachment action was an abuse of the powers of the court and to that extent res judicata in the wider sense applied, so as to nullify the impeachment proceedings.

Fortunately, I have personal knowledge of this case as I acted as counsel for the plaintiff. The plaintiff's appeal to the Federal Court was allowed and the bank's application to strike off was dismissed. The Federal Court in its oral judgment held that there were sufficient grounds of fraud raised to let the case go for trial.

In this case, the respondent/plaintiff only became aware of the two improper instruments of power of attorney after the High Court hearing. The allegations of fraud as pleaded if proved will clearly impeach the earlier judgments obtained. The plaintiff must be given the right to trial.

The appeal is therefore dismissed with costs against the fourth defendant.

Appeal dismissed with costs.

Reported by Loo Lai Mee